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No. 364

In the Supreme Court of the United States

OCTOBER TERM, 1958

ALBERT GEORGE FOUTS AND VIRGIL SUMMERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals, affirming the judgment of the District Court (Pet. 11), is not yet reported. The prior opinion of the Court of Appeals remanding the cases to the District Court for further findings of fact is reported at 253 F. 2d 215. The opinion of the District Court setting forth its findings (Pet. 13) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1958. The petition for a writ of certiorari was filed on September 15, 1958. The juris-

diction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the courts below properly found that petitioners waived their right to a speedy trial.

STATEMENT

On August 23, 1946, a federal warrant issued for the arrest of petitioners and two others for the robbery of a federally insured bank in Ansonia, Ohio, on November 8 or 9, 1945 (App. 15a, 1a). An indictment was returned on December 9, 1946, in the United States District Court for the Southern District of Ohio, Western Division, charging bank robbery in violation of 12 U. S. C. 588b (App. 15a, 14–3a). At the time of the indictment, petitioners were incarcerated in the Ohio State Penitentiary at Columbus, serving state sentences for armed robbery committed in Montgomery County, Ohio in June, 1946 (App. 16a).[1] Ten years later, in August, 1956, petitioners were paroled by the state but not released because of federal detainers lodged there. In September and November, 1956, petitioners were delivered to federal authorities pursuant to the August, 1946, warrant (App. 16a). On arraignment in October, 1956, in the

[1] The initial decision of the Court of Appeals as reported in the petition (Appendix C, p. 20) incorrectly creates the impression that the state sentences were imposed for the same robbery charged in the federal indictment. This misapprehension is corrected in the printed report. See 253 F. 2d 215.

The state warrant was issued on July 6, 1946, trial was begun on August 14, 1946, and culminated August 26, 1946, in a verdict of guilty (App. 16a).

District Court, petitioners entered pleas of not guilty to the federal indictment (App. 16a, 17a).

On January 4, 1957, petitioners sought dismissal of the federal indictment on the ground that their constitutional rights to a speedy trial under the Sixth Amendment had been violated (App. 3a–9a, 17a). The District Court deferred ruling on the motions until the government had completed its case, heard a renewal of the motions, and then dismissed them (App. 17a). Petitioners were found guilty by a jury (App. 17a) and sentenced to terms of five years (App. 18a–20a).

On separate appeals consolidated by the Court of Appeals, petitioners urged that the District Court erred in dismissing their motions to dismiss the indictment in that they had been denied the right to a speedy trial (App. 10a–14a). The Court of Appeals, noting that the record did not indicate whether petitioners, during their incarceration by the state, had knowledge of the federal indictment pending against them, remanded the case to the District Court for a factual determination as to whether petitioners had waived their rights to a speedy trial (253 F. 2d 215).

On April 22, 1958, in compliance with this mandate, the District Court held a hearing, with both petitioners present and represented by counsel (Tr. 1).[2] The government produced the testimony of F. B. I. agent Jahn, the officer in charge of the bank robbery investigation who had signed the initial complaint and

[2] Tr. refers to the transcript of the testimony taken before the District Court on the remand of the case, a copy of which has been filed with this Court.

who had examined court records of the return of the indictment (Tr. 5, 15, 16). He testified that he interviewed petitioners separately in the Ohio State Penitentiary in February 1947—talking with Fouts once and Summers twice (Tr. 5–6). He began his interviews by advising each of the indictment returned against him in December 1946 for the burglary of the Ansonia, Ohio, bank (Tr. 7). Fouts said he had no comment (Tr. 8). Summers said that he was not going to make any move, that he was willing to wait, and that he wanted to wait and see what happened (Tr. 9). Jahn specifically remembered prefacing his interviews with a statement about the indictment because the "basic point" of his interview was "the question of winding all of that [pending matters] up together rather than the possibility of [petitioners] facing them separately" (Tr. 17).

The government also produced the testimony of state prison and parole authorities which established, *inter alia*, the earliest dates on which it was definitely documented that petitioners were aware of the federal detainers placed against them—in the case of Fouts, some five and a half years, and Summers two years prior to their release (Tr. 21, 26–27).[3]

In a written opinion, the District Court found that an indictment filed in December, 1946, for an offense committed in November, 1945, was returned in a reasonable length of time, that petitioners, having been

[3] Other evidence, a 1953 letter from a Columbus attorney to his client, Fouts, regarding the federal indictment, was ruled incompetent on the objection that it was a privileged communication (Tr. 41, Pet. 15).

informed by Agent Jahn in February, 1947, of the indictment, and having raised no question about prosecution, had waived their rights to a speedy trial, and that petitioners, having been incarcerated for a crime committed subsequently to that for which they were indicted in the federal case, were imprisoned because of their own actions and could not be heard to complain (Pet. 13–19). The Court of Appeals affirmed.

ARGUMENT

At the outset it should be noted that it has been, for many years, the established policy of the federal government, and United States Attorneys have been directed, not to defer the prosecution of outstanding indictments merely because defendants are serving sentences in federal or state institutions. Hence, whatever may have been the reason for the delay here (which does not appear in the record) there is involved no question of general policy as to deferment of trial pending incarceration for another offense.

Neither does this case present the issue of whether prejudice must be shown in order to warrant dismissal of the indictment for lack of a speedy trial. There are no findings by the courts below on prejudice or lack of it. The court below seems to have assumed that, if petitioners had not waived or for some other reason forfeited their right to a speedy trial, dismissal would have been required irrespective of any proof of prejudice. This is in accord with a recent decision of the Second Circuit in *United States* v. *Lustman*, decided July 30, 1958, petition for a writ of certiorari

filed September 12, 1958, No. 361. See also *Petition of Procoo*, 17 F. R. D. 183, affirmed, 350 U. S. 857.

However, as both the Second Circuit in the decision cited and the court below have pointed out, it is established in the federal courts that the right to a speedy trial is a personal one which is waived if no demand is made, unless the defendant is for some reason not in a position to make the demand. *Taylor v. United States*, 238 F. 2d 259 (C. A. D. C.); *China v. United States*, 228 F. 2d 151 (C. A. 4); *Danziger v. United States*, 161 F. 2d 299 (C. A. 9), certiorari denied, 332 U. S. 769; *Collins v. United States*, 157 F. 2d 103 (C. A. 9); *Patch v. United States*, 110 F. 2d 817 (C. A. 10), certiorari denied, 310 U. S. 648; *Worthington v. United States*, 1 F. 2d 154 (C. A. 7), certiorari denied, 266 U. S. 626; *United States v. Research Foundation*, 155 F. Supp. 650 (S. D. N. Y.); *United States v. Chase*, 135 F. Supp. 230 (N. D. Ill.); *United States v. Alagia*, 17 F. R. D. 15 (D. Del.). Admittedly, petitioners made no demand for a prompt trial. Thus, the narrow issue presented here is whether the courts below properly found, on the particular circumstances presented by this record, that there are no facts which would take this case out of the general rule that demand must be made. There is no occasion to review the specific findings of the district court which were affirmed by the Court of Appeals on this issue. It is clear that each of the petitioners was informed some two months after the indictment of its existence, its place, its return date and the offense charged. This information was given to them by the F. B. I. agent who had initiated the

complaint in the first instance, had testified before the grand jury, and who had personal knowledge of the existence of the indictment after checking the records of the District Court (Tr. 5–17). Petitioners were on clear and explicit notice of the fact that they were under federal indictment. In contrast, in *Taylor v. United States*, 238 F. 2d 259 (C. A. D. C.), relied upon by petitioners, Taylor knew only that he was accused of crimes. The indictment was not returned until three years after he had been so advised.

The fact that petitioners were incarcerated in a State institution did not prevent them from seeking a trial on the federal indictment of which they had knowledge. Petitioners were able to communicate with the court, friends or counsel. They were not unfamiliar with criminal procedure. Defendants have been held to their duty to demand a trial even though they were incarcerated. *Morland v. United States*, 193 F. 2d 297 (C. A. 10); *Carter v. Tennessee*, 18 F. 2d 859 (C. A. 6).[1] A defendant in jail for another offense is not entitled to greater rights than one who is not in jail. Indeed, as to petitioner Summers, the record indicates that failure to demand a trial was a conscious and deliberate choice, since, when he was

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[1] Cf. *United States v. Lane*, 135 F. Supp. 230 (N. D. Ill.), where the court found no waiver despite absence of demand because defendant was held under maximum security conditions which made it virtually impossible to demand a trial.

While, as noted above, the policy of the federal government is to prosecute defendants incarcerated for other offenses, courts have held that defendants cannot complain of delays caused by their own wrongdoing. See *Nolan v. United States*, 193 F. 2d 768 (C. A. 8), certiorari denied, 333 U. S. 846.

informed of the indictment, he stated that he would wait and see what happened. The finding of waiver is therefore amply supported.*

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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* There is no merit to petitioners' argument that the Court of Appeals erred in remanding their cases to the District Court for findings as to the issue of waiver. Under 28 U. S. C. 2106, a court of appellate jurisdiction is given broad powers as to matters brought before it for review including the right to "remand * * * and direct * * * or require such further proceedings to be had as may be just under the circumstances". This right extends to both civil and criminal matters. See *Ballew* v. *United States*, 160 U. S. 187, 202. A remand may involve the authority to take further evidence. See *Willing* v. *Bienstock*, 302 U. S. 272.

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